Britt Metal Processing, Inc. *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 12–CA–16006 and 12–CA–16734

October 28, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On August 11, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified.[2]

As the judge found, once a union has been selected to represent an appropriate unit of employees, the employer may not make decisions regarding any term and condition of employment without first notifying the union and providing it with the opportunity to bargain.[3] The Respondent made changes in its 401(k) retirement plan in January 1994, after the Union was selected as the bargaining agent for its employees. The Respondent, however, asserts that it was not required to bargain because the decision to reduce its matching contributions to the employees' 401(k) retirement plan was made prior to the advent of the Union, and the Respondent was merely carrying out that decision in January 1994.

On July 28, 1993,[4] the Respondent made a decision to change the 401(k) retirement plan effective January 1994. In August, it wrote a letter to the trust administrator directing implementation of that change. The Respondent's statements in its October 28 letter to employees, however, clearly show that by that date the Respondent was no longer pursuing this course. Thus, the letter states in relevant part:

> I think you know by now that the IAM has been lying to you. You have learned, *that in bargaining*, you can lose or gain benefits and pay, also every benefit you have will be up for negotiation! Employees of some companies seek a union because they have so few benefits and they are willing to *gamble. This is what you would be gambling with at the bargaining table*:
>
> 1. 401K with 100% company matching funds of the first 2% of compensation and 50% of the next 3%. [Emphasis added.]

The Respondent asserts that the letter merely describes the level of retirement benefits currently enjoyed by the employees and that when the Respondent sent the October 28 letter it was under no obligation to disclose to its employees that a decision had already been made to reduce the amount of its contributions to the 401(k) retirement plan.[5]

The difficulty with the Respondent's contention is that, in the October 28 letter, it did more than list the current benefits. It also indicated that the employees would continue to have these benefits in the future unless they were lost at the bargaining table. Thus, the Respondent stated that the employees would be "gambling" with their benefits at the bargaining table, thereby clearly informing the employees that the listed benefits would continue unless bargained away. That pronouncement is inconsistent with the Respondent's present assertion that the employees' benefits had already been reduced as a result of its July decision. Rather, it is obvious from the October 28 letter that, as of that date, the Respondent was no longer pursuing the course of action it began in July.[6] Having abandoned this course, the Respondent cannot use its actions during that period to avoid having to bargain with the Union concerning its postelection decision to change the 401(k) retirement plan.[7]

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its matching contribution amounts to the employees' 401(k) retirement plan without giving the Union notice and an opportunity to bargain about the subject.

In addition, we agree with the judge and adopt his recommendation to extend the bargaining year to provide the Union with the benefit of its certified status. We therefore grant the General Counsel's request that

[1] We shall modify the Order and notice to employees to correct the judge's inadvertent reference to "the January 1993 reduction made in contributions to the Company's 401(k) retirement plan." The correct date is January 1994.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] *UARCO Inc.*, 283 NLRB 298 fn. 2, 300–301 (1987).

[4] All dates are in 1993 unless indicated otherwise.

[5] The Respondent does not contend that the letter was inaccurate or that it constituted a misrepresentation of employee benefits.

[6] The judge notes that the Respondent's financial situation changed by October and draws an adverse inference from the failure of the Respondent to produce evidence as to its financial condition. We do not rely on these findings.

[7] Member Higgins finds it unnecessary to determine whether, in fact, the Respondent had abandoned the decision to reduce its contributions. Whether or not it had done so, its letter certainly was designed to give the employees an assurance that the plan was alive and well and that the only way the plan would suffer would be if it became a subject of collective bargaining as a result of the employees choosing the Union. Having given this assurance, the Respondent cannot now change the plan without bargaining.

the remedy include the provision for extending the bargaining period for 11 months on resumption of good-faith bargaining between the Respondent and the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Britt Metal Processing, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Refusing to bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL–CIO.

(b) Unilaterally reducing the Company's contributions to the employees' 401(k) retirement plan.

(c) Failing to timely supply relevant and necessary information requested by the Union.

(d) Not giving the Union an adequate opportunity to bargain about merit wage increases.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by us at our facility located at 15800 N.W. 49th Avenue, Miami, Florida; excluding all other employees, lead persons, managers, guards and supervisors as defined in the Act.

(b) Regard the Union, on resumption of bargaining, and for 11 months thereafter, as if the initial bargaining year following certification had not yet expired.

(c) Revoke the January 1994 reduction in contributions to the Company's 401(k) retirement plan and make the Respondent's employees whole for any losses they suffered as a result of that reduction.

(d) On request of the Union, withdraw the merit wage increases granted to employees in August 1994.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due under the terms of this Order.

(f) Within 14 days after the service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 1993.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with the International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following unit:

> All production and maintenance employees employed by us at our facility located at 15800 N.W.

49th Avenue, Miami, Florida; excluding all other employees, lead persons, managers, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally reduce the Company's contributions to our employees' 401(k) retirement plan.

WE WILL NOT fail to timely supply relevant and necessary information requested by the Union.

WE WILL NOT fail to give the Union an adequate opportunity to bargain about merit wage increases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the International Association of Machinists and Aerospace Workers, AFL–CIO and, WE WILL regard the Union, on resumption of bargaining, and for 11 months thereafter, as if the initial bargaining year following certification had not yet expired.

WE WILL revoke the changes we made in reducing our contributions to the Company's 401(k) retirement plan in January 1994, and WE WILL make our employees whole for any losses they suffered as a result of our reduced contributions.

WE WILL, on request of the Union, cancel the merit wage increases we granted to employees in August 1994.

BRITT METAL PROCESSING, INC.

Shelli B. Plass, Esq., for the General Counsel.
Peter L. Sampo, Esq., of Coral Gables, Florida, for the Respondent.
Freddie L. Clay, Esq., of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Miami, Florida, on May 25, 1995. A complaint issued against Britt Metal Processing, Inc. (Respondent) on April 27, 1995.[1] The complaint is based on charges filed by the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union). The primary issues are whether Respondent violated Section 8(a)(1) and (5) of the Act by reducing contributions to a 401(k) retirement plan, refusing to furnish information to the Union, and unilaterally granting merit wage increases.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Florida corporation with an office and place of business at Miami, Florida, where it is engaged in the business of servicing aircraft engines. During 1994, Respondent purchased and received goods and materials valued in excess of $50,000 at its Miami facility directly from points located outside the State of Florida. The complaint alleges, Respondent admits, and I find that Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On September 9, 1993, the Union filed a representation petition regarding certain of the Respondent's employees. In an election held November 10, 1993, a majority of the employees voted in favor of union representation. The Union was certified November 24 to represent all production and maintenance employees.

The parties commenced bargaining but to date have not reached agreement on a collective-bargaining contract. Grand Lodge Representative Juan Maldonado has been the chief negotiator for the Union. Attorneys Peter Sampo and Robert Norton, along with Richard Britt Jr., a stockholder and director of Respondent, have represented the Company in negotiations.

B. *401(k) Retirement Plan*

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act by not giving the Union an opportunity to bargain concerning changes in the Company's retirement plan. The Respondent concedes that it made the changes and that contributions to the retirement plan are a mandatory subject of bargaining. The Respondent also admits it did not give prior notice to the Union or afford it an opportunity to bargain about the change. However, the Company defends on the basis that the change was authorized before there was any obligation for it to bargain with the Union.

In 1993 the Respondent had a 401(k) retirement plan to which it contributed for the benefit of its employees. The Respondent would match 100 percent of the first 2 percent of compensation received by employees and then 50 percent of the next 3 percent. On July 28, 1993, a special meeting of Respondent's board of directors was convened to discuss problems with the Company's financial status. At this meeting it was decided Respondent's contributions to the plan would be reduced beginning in January 1994.

On August 3, 5 days after the meeting, Company President Richard Britt Sr. wrote a letter to the retirement fund trust administrator, Moring & Armstrong, directing implementation of the changes in contributions. The letter recites the

[1] All dates refer to 1994 unless otherwise indicated.

change is necessitated by past financial problems and "the poor prospects for the end of the year." (R. Exh. 4.)

The Respondent's financial outlook changed quickly. On August 9, 6 days after its letter to Moring & Armstrong, Respondent received a new, and unexpectedly generous, contract for work from the Garrett Division of Allied Signal Corporation. The Company was extremely pleased by this new business. As a result the Respondent immediately granted a 5-percent wage increase to all employees.

In the meantime, the Union was organizing the Respondent's employees. With the filing of the September 9, 1993 petition for election, the parties began their election campaigns. On October 28 the employees received a letter from the Respondent concerning the November 10 election. The letter reads in part:

> I think you know by now that the IAM has been lying to you. You have learned, that in bargaining, you can lose or gain benefits and pay, also every benefit you have will be up for negotiation!
>
> Employees of some companies seek a union because they have so few benefits and they are willing to gamble. *This is what you would be gambling with at the bargaining table:*
>
> 1. 401K with 100% company matching funds of the first 2% of compensation and 50% of the next 3%,
>
> . . . .
>
> *You kept your great benefits and as soon as the company began to do a little better you got a 5% raise.*

[Emphasis added. G.C. Exh. 22.]

As indicated, the Union won the November 10, 1993 election. On January 6, 1994, the Company posted a notice on the bulletin board that, for the first time, gave employees notice that the Respondent's contributions to the 401(k) plan would be reduced:

> Effective with pay period ending January 9, 1994, due to poor business performance in 1993, the company has decided to change its matching contributions to the 401K plan to 25% of the first 5% of eligible pay. [G.C. Exh. 24.]

The Respondent did not give the Union any similar notification of the change or an opportunity to bargain about the reduction.

C. *Analysis of the 401(k) Contribution Reduction*

The Respondent argues that it had no obligation to bargain about a matter that had been decided prior to the certification of the Union. *Sivalls, Inc.*, 307 NLRB 986 (1992). However, that general principle is distinguishable from the present situation because of events subsequent to the board of directors' meeting.

First, the financial situation at the Company apparently changed significantly after the decision was made. A windfall contract resulted in employees being given an immediate 5-percent pay raise. The Respondent chose not to present any specific evidence as to why the raise was possible when there were "poor [financial] prospects for the end of the year." Rather than speculate as to what the Company's finances were at any given time, I chose to draw an adverse inference.

Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. The Respondent has failed to produce testimony and records within its control which show the financial condition of the Company after the decision was made to reduce retirement benefits. I make the limited inference that if such evidence had been produced it would have been contrary to Respondent's assertion that the Company's yearend economic position was "poor." *International Automated Machines*, 285 NLRB 1122–1123 (1987); *Adair Standish Corp.*, 290 NLRB 317, 318–319 (1988).

A second event, the Employer's campaign letter also dilutes the argument that the 401(k) contributions could be reduced without bargaining. In that letter, the Respondent reiterated with great emphasis the particulars of the retirement benefit. The employees are told how they "kept" their "great benefits." With equal emphasis it was made clear how the benefit was in jeopardy in bargaining if the employees chose the Union. There was no mention that a decision had been made to decrease contributions to the plan.

Only after the workers voted in favor of the Union did the Respondent tell employees it was curtailing contributions. The Respondent's unilateral reduction was in stark contrast to its propaganda pronouncement. The Company offered no explanation for its election letter position. I find that the October 28 letter was an affirmation that the employees' receipt of retirement contributions was unchanged.

In sum, the Respondent has failed to prove that it could make the benefit payments change without bargaining. The General Counsel has shown by a preponderance of the evidence that Respondent unilaterally reduced its contributions to the 401(k) plan without giving the Union notice and an opportunity to bargain about the subject. This unilateral action is a violation of Section 8(a)(1) and (5) of the Act.

D. *Refusal to Furnish the Union with Information*

The complaint alleges the Respondent refused to furnish the results of a survey conducted among employees. The Company asserts that the information has now been provided and that, in any case, it was not critical to the Union's collective-bargaining responsibilities.

In the summer of 1994, the Respondent contracted with a work force analyst, Dr. Ronald Gilbert, to provide a training program for management. As part of this program employees were asked to fill out a voluntary survey which covered many subjects concerning the Company. The completed surveys were then given to Dr. Gilbert.

On July 8, 1994, Maldonado sent a letter to Norton requesting, among other documents, the results of the employee survey. On July 28 Norton replied by letter stating: "Rick Britt has not yet received the results but when he does we will provide this to you promptly." (G.C. Exh. 6.)

The Respondent, however, did not supply the information or seek to obtain it at that time from Dr. Gilbert. Only after the Union filed charges on November 8, 1994, and April 20, 1995, did the Company contact Dr. Gilbert to get the results of the survey. He sent the report (which bears the date July

20, 1994) to the Respondent in late April 1995. The Respondent then supplied the documentation to the Union by letter dated May 1, 1995.

E. *Analysis of the Information Request*

The information contained in the survey results pertains generally to the terms and conditions of the Respondent's employees.[2] I find that, under the Board's broad discovery-type standards, the Union's request for information was presumptively necessary and relevant to its collective-bargaining functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Ohio Power*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

It is well settled that an employer violates Section 8(a)(1) and (5) of the Act by not furnishing information which is relevant and necessary for a union to have in order to fulfill its bargaining duty. *Hobelmann Port Services*, 317 NLRB 279 (1995). It is also a violation of the Act to not timely supply such information. *Postal Service*, 308 NLRB 547, 551 (1992).

The violation alleged in this complaint is the failure to provide the information. However, the Respondent supplied the information a few days before the hearing. The subsequent submission of the information changed the situation somewhat, but not the violative nature of the Respondent's conduct. The delay in providing the information was fully litigated at the hearing. The Respondent has offered no valid reason for its 10-month procrastination in responding to the Union's information request. I find that the Respondent violated Section 8(a)(1) and (5) of the Act by its failure to timely supply the information. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).[3]

F. *Merit Wage Increases*

The General Counsel alleges that on or about August 15, 1994, the Respondent unlawfully granted unilateral merit wage increases to some employees. The Company defends on the basis that adequate notice was given to the Union and it waived the right to bargain by not objecting to the raises.

By agreement of the parties, initial negotiations had not involved economic items. That is how the matter of wages stood on August 10 when Attorney Sampo sent a letter to Maldonado and a copy to Union Grand Lodge Representative Tommy Daves. The letter stated Respondent's intent to "provide merit wage increases to various employees." (G.C. Exh. 11.) The letter did not list the amount of the raises, when they would be implemented, or the names of the employees who were to receive the raises. The letter asked for the Union's comments, questions, or concerns by 5 p.m., August 12.

The letter to Maldonado was sent to his office, which is at his residence in Puerto Rico. The letter was received there August 11. However, Maldonado was in the mainland and did not see the letter until his return that weekend, after the passage of the deadline. His wife who serves as his volunteer assistant did open the letter on August 11.

The record does not reflect any information about Daves' receipt of the letter or any actions he took in that regard. Daves, whose office is in Dallas, Texas, had not been participating in bargaining on behalf of the Union.

On August 16, the Company's bookkeeper started the process for giving the designated employees merit increases. The employees learned of the raises when they received their paychecks on August 25.

Maldonado testified that by the time he saw the August 10 letter he determined it was too late to comment on the raises. He complained of this fact when on August 29 he sent a response to Sampo's letter. (G.C. Exh. 12.) Maldonado also stated that to better understand what the Company was proposing the Union needed the names of the employees, their classification, and the history of wage increases. The letter did not state any position on the granting of the merit wage increase.

The next negotiation meetings were held September 7 and 8. At that time the Union received some of the information asked for concerning the wage increases. Norton handed Maldonado a piece of paper with 10 employees' names which noted their raise amount. Norton stated the list contained the names of those who had received the merit increase.

On September 8 Sampo wrote Maldonado referring to his August 29 letter. (G.C. Exh. 15.) Sampo complained about the Union's waiting nearly 3 weeks to raise any issue about the merit wage increases. Sampo anticipated that he would be able to provide Maldonado the additional information he wanted on the wage background by the week of September 23. On September 26, Maldonado received the remainder of the information he had requested about wages.

Thereafter, the parties sparred over wages. Norton told Maldonado that the Company wanted to give an additional round of merit wage increases to some employees. Maldonado protested this time saying that the Union did not want the Respondent granting piecemeal raises. Maldonado asked for an overall wage proposal. Instead the Company withdrew its offer of the second round of merit increases and told the Union it would remain with the status quo regarding wages.

As a justification for the August 10 notice the Company cites its past practice in dealing with the Union. Approximately 2 months prior to the August 10 letter concerning merit wages the Respondent sent the Union a letter stating it wanted to implement a night shift. The letter said Respondent would pay the night-shift employees a 10-percent wage differential. The letter asked the Union to responded to the Company within 2 days as to whether or not they had any questions, comments, or concerns. (R. Exh. 1.) No reply was received from the Union.

Maldonado distinguished the night-shift situation. He stated the Union never objected to the notice period that was in that letter because of the 10-percent wage differential was agreeable to the Union.

---

[2] E.g., worker cooperation, communication between management and employees, employee performance, working in multidiscipline teams, worker frustration, and employee involvement in decision making.

[3] The Respondent, for the first time, argues in its brief that the Union's request for information was not continuous from July 8 and thus Sec. 10(b) of the Act precludes the finding of a violation. However, the November 1994 charge alleges the refusal to supply the information. The November charge language is sufficient to timely raise the issue within the 10(b) period.

G. *Analysis of the Merit Increases*

The violation alleged regarding the merit raises is that the Respondent acted "without prior notice to the Union and without affording the Union an opportunity to bargain." (Complaint par. 8(d).) With regard to the notice allegation, I find the Respondent did inform the Union of the raises prior to implementation when it sent the August 10 letter to Maldonado and Daves.

With regard to the opportunity to bargain issue, the matter hinges on whether the notice was timely. Clearly the response time invoked by the Respondent was very short. Under the circumstances of this case, such brief notice was not conducive to orderly bargaining. Both Maldonado and Daves were sent letters to their out-of-state offices. Under even the most ideal conditions, such scant notice was a risky proposition for assuring a reasonable opportunity for receipt and consideration. The Union had the right to a sufficient opportunity to investigate the matter before implementation. As the Board stated in *Intersystems Design Corp.*:[4]

> To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of fait accompli.

The information contained in Respondent's August 10 letter was scarce as to the details of the raises and, importantly, did not provide a reasonable response time to the Union. The terms of the letter suggested to Maldonado that the matter was a fait accompli by the time he read the letter. Even though the raises had not been fully implemented immediately, the Respondent's letter did not state anything about a delay in processing. Maldonado's reaction that there was nothing to do immediately was not unreasonable under the circumstances. I credit his testimony that he felt it was futile to attempt to bargain about the wage increases after the deadline had passed. His action in asking for details and clarifying information within 17 days demonstrates that the Union did not waive bargaining over the issue but was clearly concerned about the details of the employees' wages.

The Company offers no explanation why a rush response was needed. The Respondent does point out that a similar reply time was used in initiating the night shift. Of course, in that instance the Union had not opposed the proposal. It begs the question to cite the night-shift incident in a situation where questions or objections are raised.

Under all the circumstances, I conclude that the August 12 deadline was not timely notice to the Union. I therefore find that the Respondent violated Section 8(a)(1) and (5) of the Act by not giving the Union an adequate opportunity to bargain about the merit wage increases. *M. A. Harrison Mfg.*, 253 NLRB 675 (1980).

[4] 278 NLRB 759 (1986), quoting from *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1324 (7th Cir. 1983).

CONCLUSIONS OF LAW

1. Britt Metal Processing, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its facility located at 15800 N.W. 49th Avenue, Miami, Florida; excluding all other employees, lead persons, managers, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 2(5) of the Act.

4. Since November 24, 1993, the Union has been and is the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the following conduct:

(a) Reducing the Company's contributions to the employees' 401(k) retirement plan without notice to, or bargaining with, the Union.

(b) Failing to timely supply relevant and necessary information requested by the Union.

(c) By not giving the Union an adequate opportunity to bargain about merit wage increases.

6. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act except as here specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent failed to notify and bargain with the Union as to the reduction of its contributions to the employees' 401(k) plan, to provide timely notice of merit increases, and to give relevant information to the Union, the Respondent is ordered to bargain in good faith with the Union. In addition, the Respondent is ordered to make whole the employees for the reduced contribution amounts to the 401(k) plan. Any additional amount the Respondent must pay into the retirement fund shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Company shall be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of this compensation for reduced contributions.

The General Counsel seeks, as part of the remedy, to extend the certification year to enable a reasonable period for good-faith bargaining. The Union was certified on November 24, 1993. The Respondent commenced its unlawful conduct on January 6, 1994, when it posted the notice reducing contributions to the 401(k) retirement fund without first giving the Union notice and an opportunity to bargain. By engaging in this conduct and its subsequent refusal to furnish information and granting merit increases without giving the Union an adequate opportunity to bargain the Respondent failed to bargain in good faith, substantially deprived the employees

of the benefit of collective-bargaining representation and deprived the Union of the benefit of its certified status. Therefore, I recommend that on the resumption of good-faith bargaining the Union be entitled to an 11-month period in which its certification year protection is regarded as having not expired. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964).

As the merit raises were implemented without the Union having a timely opportunity to bargain about the issue, I shall order that on the Union's request, the Respondent shall cancel the merit wage increases granted to employees under the terms of the August 10, 1994 letter. Such raises shall not be withdrawn except by specific request of the Union. *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

[Recommended Order omitted from publication.]